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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CRE VENTURE 2011-2, LLC, Plaintiff and Respondent, v. CENTURION PROPERTY MANAGEMENT GROUP II, LLC, et al., Defendants and Appellants.	B237991 (Los Angeles County Super. Ct. No. BC427618)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ramona G. See, Judge. Affirmed.

Pircher, Nichols & Meeks, James L. Goldman for Defendants and Appellants.

Polsinelli Shughart, Wesley D. Hurst, Michael P. Cutler for Plaintiff and Respondent.

Defendants and appellants Centurion Property Management Group II, LLC, Centurion Partners, LLC, and Francesco Mileto appeal from the judgment entered in favor of respondent CRE Venture 2011-2 LLC. We affirm.

Facts

The complaint in this action was filed in December of 2009. The plaintiff was the First Regional Bank. As to appellant Centurion Property Management Group, the complaint brought causes of action for breach of contract, money lent, and money had and received, on factual allegations that in November of 2008, First Regional Bank had extended a line of credit in the amount of $8 million to Centurion Property Management Group, that the promissory note (hereinafter, "the Centurion Note") required Centurion Property Management Group to make monthly payments beginning in December 2008, but that Centurion Property Management Group had not made those payments.

There was also a cause of action against appellant Centurion Partners for breach of guaranty, on factual allegations that it had guaranteed payment of the Centurion Note, and numerous causes of action against appellant Mileto for breach of guaranty of the Centurion Note and breach of guarantees of loans to related entities.

In January 2010, the FDIC became the receiver of the First Regional Bank. In August 2012, on the FDIC's unopposed motion, we ordered respondent CRE Ventures substituted in place of the FDIC.

Trial was to the court. There were many stipulated facts and exhibits, generally concerning the identities of the parties, the terms of the notes and guarantees, respondent's demands for payment, and the lack of payment. Over appellants' hearsay objection, respondent also introduced loan histories and loan payoff statements for each loan. Respondent used this evidence to establish the exact sums due, considering unpaid balances, and accrued interest at the rates applicable both before and after default on the notes. Apparently, most or all of the notes were secured by real estate, and the sum due also had to reflect advances made to protect secured assets, such as real estate taxes.

The court found in favor of respondent and against all appellants, awarding $6,998,137 against all appellants and an additional $8,236,216 against Mileto only.

There are three issues on appeal, whether the trial court erred in admitting into evidence as business records the loan histories and loan payoff statements; whether respondent proved an element of its breach of contract claim, that respondent itself performed; and whether the verdict on the causes of action for common counts concerning the Centurion Note must be reversed because there was no breach of a contract.

Discussion

1. Admission of the loan histories and payoff statements

The records were admitted under Evidence Code section 1271, the business records exception to the hearsay rule, which provides that "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or even if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

When documents are offered under an exception to the hearsay rule, the trial court has broad discretion in determining whether a sufficient foundation has been laid. We reverse only if the court clearly abused that discretion. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319.) We see no abuse of discretion here.

In order to lay a foundation for the introduction of the loan histories and loan payoff statements, respondent called[1] John Schulhof, a former Senior Vice President and

[1] After those witnesses testified, the trial was halted for several weeks for additional briefing on an issue. When trial resumed, the parties agreed to proceed through declarations.

Chief Special Assets[2] Officer of First Regional Bank, and Anson Lang, a Vice President at SitusServ, L.P., which serviced First Regional's loans for the FDIC. Schulhof testified about First Regional's records and record keeping in general and the loan histories in particular, testifying, inter alia, that the records were maintained in the regular course of business, that First Regional's policy was that transactions be recorded as soon as possible, and that he was one of the custodians of the records. Lang testified about the payoff statements, which he prepared from records which SitusServ received from the FDIC and from SitusServ's own records. He testified, inter alia, that the records were maintained in the regular course of business, that SitusServ required events to be recorded within 48 hours, and that he was one of the custodians of the records.

In its statement of decision, the trial court summarized the evidence: "Mr. John Schulhof and Mr. Anson Lang testified that employees with personal knowledge of disbursements and payments on the subject promissory notes promptly made records of these disbursements and payments into a database as part of their regular job responsibilities. This Court finds that Mr. Schulhof is a qualified witness to lay foundation for the subject records . . . because he is the Senior Vice President and Chief Special Assets Officer of the Special Assets Department of First Regional Bank and is one of the custodians of records for First Regional Bank pertaining to the subject promissory notes and guaranties at issue in this action. Pursuant to his declaration in lieu of live testimony, Mr. Schulhof testified: [¶] 'I personally worked with, and on, First Regional Bank's Records and have personal knowledge that the Records were kept in the usual and ordinary course of First Regional Bank's business and that the entries therein were made at or about the time of the events recorded by individuals employed by First Regional Bank who had personal knowledge thereof and who had a continuing business duty to make those entries and record those events at or about the time of the events recorded.' [¶] Mr. Schulhof went on to describe in detail his knowledge of the bank's required procedures for the manner in which originals of the subject documents and all

[2] In this context, "special" means "nonperforming."

related documents were processed and stored and the subject accounts were monitored, how the information contained in those documents was inputted into the computer system, and how the bank's tracking system of the amounts paid, owed and interest accrued on each of the subject promissory notes. Thus, the Court finds Mr. Schulhof had the background, training, experience and knowledge to lay proper foundation for the documents and did so."

The court further found, "In addition, Mr. Lang is a Vice President for . . . loan servicer for the subject promissory notes . . . . Mr. Lang reviewed the bank documents which were properly authenticated as business records by Mr. Schulhof and compiled summaries of information from those bank records from a computer system for which Mr. Schulhof also already provided proper authentication. As a result, this Court finds that these witnesses laid sufficient foundation for the bank record exhibits and this Court finds that these exhibits qualify as business records, an exception to the hearsay rule."

Appellants argue that the records were not trustworthy and should not have been admitted because neither Schulhof nor Lang personally prepared the underlying documents or tested the accuracy of the computer systems, and because there was no evidence concerning the "workings" of the hardware and software systems.

Appellants cite, for instance, Lang's testimony that he had no personal knowledge about the making of the loans or their administration, but prepared the loan payoff statements from the records, and Schulhof's testimony that he did not begin work in Special Assets until April of 2009, after most of the advances were made, and did not personally approve any of the advances. Appellants contend that "[n]either of [respondent's] witnesses has any personal knowledge about the underlying transactions, or about how the data in the ledgers or other underlying documents in which advances and payments . . . were recorded or how they became a part of the loan histories."

However, as the trial court noted, Schulhof testified in detail about the bank's recordkeeping practices and the preparation of the loan histories. Similarly, while it is certainly true that Lang prepared the loan payoff statements from documents prepared by

others, at another institution, that fact does not render the loan payoff statements untrustworthy. Indeed, it is difficult to imagine any other way in which loan payoff statements could be generated. The business records exception to the hearsay rule does not mandate that a party call as witnesses the people who actually input the data and opened the envelopes.

"[A] person who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a 'qualified witness' for purposes of Evidence Code section 1271." (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 640; *People v. Dorsey* (1974) 43 Cal.App.3d 953, 960-961.)

Remington Investments, Inc. v. Hamedani (1997) 55 Cal.App.4th 1033 and the out-of-state cases cited by appellant establish only that documentary evidence will be excluded when there is an insufficient showing of trustworthiness. That is not the case here.

2. Respondent's performance under the contract

Appellants next contend that respondent failed to prove an element of the breach of contract cause of action against Centurion Property Management Group, that respondent itself performed its obligations under the Centurion Note. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Appellants' contention is that respondent did not prove that it made the advances in a timely manner.[3]

As the trial court observed, the Centurion Note itself does not include a requirement that advances be made in any particular time frame. Appellants point to another trial exhibit, an Addendum to the Note, which provides that the borrower may make twice-monthly applications for advances, on a specified form, "supported by such

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[3] At trial, appellants agreed that this issue did not affect the common count causes of action, but argued that it did affect the breach of guarantee, because the guarantor was only liable for a breach of contract, not on common counts.

evidence as Lender shall reasonably require," for "work actually completed," and "material and equipment actually incorporated into the project." The Addendum then provides that "Advances will be funded by Lender within seven (7) business days of submission to the Lender of a complete application payment."

Appellants contend that respondent did not prove that advances were funded within seven business days, and contends that exhibits at trial establish that it did not do so.

On this issue, the trial court found, "[Appellants] argue that [respondent] cannot maintain any of its claims on any of the subject promissory notes, modification agreements and guaranties because [respondent] failed to timely provide such amounts to [appellants]. The only competent admissible evidence presented to this Court, however, demonstrated that [respondent] performed all of its obligations under each of the subject notes, modification agreements and guaranties and [appellant] breached the terms of each of those agreements by failing to pay [respondent] the amounts due and owing." We see no reason to disturb that finding.

First, as respondents argue, appellants' ability to raise this issue is limited. During discovery in this case, respondent requested, inter alia, appellants' evidentiary basis for their claim that respondent failed to timely respond to and fulfill draw requests under the Centurion Note. Appellants did not respond to this and other discovery, and as a result, entered into a stipulation which barred them from raising their affirmative defenses, which included failure of consideration. The trial court found that the stipulation did not absolve respondent from proving the elements of its case.

Under these circumstances, we agree with respondent that it sufficiently proved the elements of its case when it proved that it lent the money. The advances were recorded in the loan histories and other documents which respondent entered into evidence, and that is enough. We do not see that, as part of its case in chief, respondent was required to submit evidence concerning each of Centurion's requests for funds, the accompanying documentation, and the timing of the advance.

Moreover, even evidence of a delay in funding would not necessarily constitute a failure of consideration which would excuse the lack of repayment. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277.) In their brief, appellants inform us that they claimed that the lack of timely advances made it impossible to pay the loans, because they could not complete construction, remove liens, or obtain tenants. That is the stuff of an affirmative defense, not a case in chief. (*Bliss v. California Cooperative Producers* (1947) 30 Cal.2d 240, 248; *Boswell v. Reid* (1962) 199 Cal.App.2d 705, 713.)

Nor do we agree with appellants that the record establishes that the advances were not timely. Appellants cite the loan history, which shows advances in December 2008, January 2009, and May of 2009, and conclude that "this history is inconsistent with the provisions of the Addendum." The loan history shows an uneven stream of advances, but given that under the Addendum, an advance depended on a proper request, we cannot find a failure of consideration merely from the uneven stream of advances.

Appellants also point to Schulhof's testimony concerning May advances. When asked, "Isn't it a fact that those advances . . . were advances pursuant to requests that had been made in prior months?" Schulhof testified that the requests were incomplete. Appellants argue that he had no personal knowledge of those matters, so that the testimony proves nothing. We do not agree. Schulhof testified that he was present at loan committee meetings which discussed the requests.

3. The judgment on the causes of action for common counts

Appellants argue that "it is not permissible to allege a common count where there is a contract governing the relationship between the parties," citing in support *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, which affirmed a dismissal after a demurrer was sustained, and which held that "As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract." (*Id.* at p. 1370.)

We do not see that *Durell, supra,* compels a reversal of the judgment here, especially where appellants do not seem to have demurred to the common counts on the

grounds now cited, and especially where appellants make no argument that reversal of the judgment on common counts would make any difference to them. (*County of Los Angeles v. Nobel Ins. Co*. (2000) 84 Cal.App.4th 939, 944–945.)

Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.